82-1872

No.

IN THE
SUPREME COURT
UNITED STATES OF AMERICA

October Term 1982

HOWARD MESSNER,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Court of Appeals No. 81-5435

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner, HOWARD MESSNER, respectfully requests that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

QUESTION PRESENTED

A.

Whether Petitioner was denied his rights, in violation of the Fourth Amendment of the United States Constitution, against unreasonable searches and seizures, where the District Court denied Defendant's motion to suppress evidence obtained from Defendant's residence pursuant to a search warrant, when the testimony showed that the Government had in fact entered Defendant's residence prior to obtaining a search warrant therefor?

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OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit here sought to be reviewed has not been reported, but is attached as Appendix A. Timely motion for rehearing was denied, and the order of denial is attached as Appendix B. The opinion of the United States District Court for the southern District of Florida was delivered from the bench in open court and has been transcribed; no opinion was reported, and no formal order denying Petitioner's motion to suppress was entered; the opinion as delivered from the bench is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 10, 1982, and timely motion for rehearing was denied on February 22, 1983. Petition for writ of certiorari should have been timely filed herein within 60 days thereafter, that is by April 23, 1983. Petitioner made application to this Honorable Court for extension of time to file petition for writ of certiorari herein, but for reasons therein set forth said application for extension of time was not filed until less than ten days before April 23, 1983; the application for extension of time was denied on April 21, 1983 (Supreme Court of the United States No. A-855). Accordingly, the instant petition for writ of certiorari is filed out of time.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In a two-count superseding indictment returned in the United States District Court for the Southern District of Florida, Petitioner was charged with possession of 2989.2 grams of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and conspiracy to manufacture and distribute cocaine, in violation of 21 U.S.C. 846. Prior to trial, Petitioner filed a motion to suppress evidence. After an evidentiary hearing Petitioner's motion was denied. Petitioner was convicted as charged, following a jury trial before Judge C. Clyde Atkins. He was sentenced to concurrent terms of four years' imprisonment on each count and a three-year special parole term on Court 1.[1]

Appeal was taken to the United States Court of Appeals for the Eleventh Circuit, assigning as error the failure of the District Court to suppress the evidence obtained from Defendant's residence pursuant to a search warrant. The Court of Appeals rejected Petitioner's appeal on all points by an order filed December 10, 1982. The Court of Appeals affirmed because the information in the affidavit used to obtain the search warrant was independently gathered and did not come from anything having to do with the prior transgression. Petitioner's motion for rehearing was denied on February 22, 1983.

1. The evidence adduced at the suppression hearing on January 5 and 6, 1981, showed that on October 7, 1980, DEA agents had been advised by a reliable confidential informant that a large quantity of cocaine was going to be delivered to Petitioner's residence that same evening by two males. Based on this information DEA agents set up a surveillance operation outside of Petitioner's residence in North Miami Beach, Florida. At approximately 8:30 p.m., two Latin males arrived at Petitioner's house in a beige

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[1] In a separate trial, co-defendant Manuel Munoz was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 1 of the original indictment). A second co-defendant, Eduardo Uejbe, fled prior to trial.

station wagon. One of the men was seen carrying a large brown bag into the house. While the men were inside the informant was contacted again. On this occasion the informant stated that the cocaine was inside Petitioner's house at the time and that the two people who had brought the cocaine would be leaving shortly with the cocaine.

Based on the tip and DEA observations, Agent Doredant left his surveillance post to attempt to obtain a search warrant. During Doredant's absence, the two Latin males were seen outside of Petitioner's house with Petitioner at about 9:30 p.m. The two Latin males went to the rear of their station wagon, placed a container inside the back of the vehicle, and then drove away. Agents Sarron, Scharlatt and Sennett stopped the station wagon a short distance away and arrested the two Latin males.

While the two Latin males were being arrested, Petitioner was observed leaving his house by car. DEA agents stopped the vehicle and arrested Petitioner. Thereafter, DEA agents searched the station wagon driven by the two Latin males and found a grayish metal tool box concealed in the spare tire well. The tool box was locked but when Agent Tomaino smelled the box he detected a strong odor of cocaine. Agent Tomaino placed the tool box back into the tire well and the vehicle was driven back to Petitioner's residence. Petitioner's car was also returned to his residence by DEA agents.

Following the arrests, Agents Scharlatt and Sarron returned to Petitioner's residence. They waited outside of the residence until they were relieved by other agents. During their wait, several people drove up to the house looking for Petitioner, including a man in a pick-up truck, who said he was a boat captain. The agents, who were stationed in the driveway at that time, told the visitors that Petitioner was not at home and that they were waiting for him too. The agents did not identify themselves nor did they discuss cocaine with any of the visitors.

Agents Hahn and Tomaino relieved Agents Scharlatt and Sarron around midnight. They only left their post for approximately five minutes on a couple of occasions during the night in order to use the restroom and get coffee. They were the only two DEA agents in the vicinity during the early morning hours. While they kept watch over the house, Agents Hahn and Tomaino sat in Petitioner's car, a Lincoln Continental because it was more comfortable.

The Government's testimony showed that at approximately 3:00 a.m., Agent Hahn noticed a white Ford pass Petitioner's house approximately three times. Each time the person in the car looked toward the house. On the fourth time the agents decided to stop the car because they thought that it might be someone trying to get into Petitioner's house or do them harm. With the assistance of a Dade County police officer, the DEA agents stopped the white car. The driver, Michael McCullough, appeared to be intoxicated, and he stated that "he knew the people in the house". After being questioned, McCullough was allowed to leave without a citation being issued for his intoxication.

Agents Hinojosa and Havens arrived on the scene at approximately 8:30 a.m., October 8, 1980. Shortly after their arrival another man, Patrick McCullough, arrived at Petitioner's residence. After the agents identified themselves, he stated that he knew Petitioner and that he was doing some landscape work for him. The agents informed him that his brother had been there during the night. The man then stated that Petitioner was a bad influence on his brother and that one of Petitioner's friends had threatened his mother. When the agents told him he could not do any landscaping at that time, Patrick McCullough left. However, he returned a short time later. During both conversations with the agents, McCullough repeatedly tried to find out why the agents were there.

That morning, Agent Doredant applied for the search warrant to search Petitioner's residence. In his supporting affidavit he stated, *inter alia*, that a confidential informant

advised him that Petitioner would receive several kilograms of cocaine at his residence during the early evening hours of October 7, 1980; that the cocaine would be delivered by a Colombian male or males; and that Petitioner owned a burgundy Lincoln automobile and a blue GMC pick-up truck, both bearing Michigan license. It was averred that DEA surveillance confirmed both the presence of these vehicles at Petitioner's residence and the arrival of two Latin males carrying a large brownish garbage bag that appeared to be half full at approximately 8:40 p.m. Doredant further stated that at approximately 9:10 p.m. the informant said that a large quantity of cocaine was inside the house at that time. Finally Doredant's affidavit recounted that the two Latin males were observed placing a box in the well in the back of their station wagon as they departed Petitioner's residence; that when the station wagon was stopped and the Latin males were arrested, a tool box was discovered in the rear of the vehicle; and that a strong odor of cocaine hydrochloride was emanating from the box. Based upon this information, a warrant was issued authorizing the search of Petitioner's residence.

At approximately 3:00 p.m. on October 8, 1980, the search warrant was executed. During the course of the search, the agents found a triple beam scale and various drug-related substances. The Government's witnesses testified that prior to the issuance of the warrant, no DEA agent had entered Petitioner's home.

2. Petitioner offered the testimony of Patrick McCullough and Michael McCullough to establish that there had been a warrantless entry into Petitioner's residence. Patrick McCullough testified that he drove his pick-up truck to Petitioner's residence, and pulled into the driveway at about 11:45 p.m. on October 7, 1980. There was no one outside the house, although there were three or four cars parked there. There were lights on inside the house. Patrick McCullough approached the house and when he got within ten feet of the gate the front door opened up and a man came out. This man unlocked the gate, and let Patrick

McCullough in. There was a second man inside the house. Patrick McCullough and the first man sat down in the Florida room, and had a conversation. There was a steak knife on a glass table, and the knife had a white residue on it. The man stated to McCullough that they had been getting high, and that that was all that was left, and made statements which Patrick McCullough interpreted as an offer for him to get high. After further conversation, Patrick McCullough became frightened for his life and left. The first man was identified as DEA agent Peter Sarran.

Patrick McCullough returned home, and informed his brother Michael McCullough as to what happened. Patrick then drove Michael McCullough back to Petitioner's house. They arrived at about 12:30 a.m. Michael McCullough got out, but was intercepted by some men who had been waiting in Petitioner's car. There were lights on in the house, and Michael McCullough saw one person inside. They then left.

Michael McCullough then returned by himself to Petitioner's house at about 3:30 or 4:00 a.m. When he pulled up in front of Petitioner's house, a patrol car pulled up behind him, and two other men got out of a car. Michael McCullough was interrogated concerning any knowledge he might have had of cocaine dealing, and was accused of being drunk. He testified he had had a beer, but was not drunk, and he was not locked up for drunk driving.

3. At the conclusion of the hearing, the district court denied Petitioner's motion to suppress. In reaching that decision the district court found that there was probable cause for the issuance of the search warrant for the residence on the basis of the affidavit of Agent Doredant and that the reliability of the informant's information had adequately been corroborated by DEA surveillance. The court further held that it was immaterial whether there was an entry into Petitioner's house prior to the issuance of the warrant because the warrant did not appear to be based on any information obtained from the alleged prior entry.

ARGUMENT

A.

DID THE DISTRICT COURT COMMIT ERROR WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM DEFENDANT'S RESIDENCE PURSUANT TO A SEARCH WARRANT, WHEN THE TESTIMONY SHOWED THAT THE GOVERNMENT HAD IN FACT ENTERED DEFENDANT'S RESIDENCE PRIOR TO OBTAINING A SEARCH WARRANT THEREFOR?

SUMMARY

I. The testimony at evidentiary hearing established that the Government actually entered Petitioner's premises prior to execution of the search warrant, or in the alternative established a factual question concerning such which the District Court did not decide.

A. Under these circumstances, the Government had the burden of proof to demonstrate that the evidence obtained from Defendant's house was not the fruit of the poisonous tree.

B. The Government did not carry its burden of proof.

C. The Government did not come within any of the exceptions to the rule concerning the fruit of the poisonous tree.

II. The Government was obligated to demonstrate that the evidence was not tainted by introducing clear and convincing evidence, but the Government did not bring forth such evidence.

III. Because the Government did not bring forth such evidence and bear its burden of proof, the case against Petitioner should be dismissed.

IV. In the alternative, this case should be remanded for a factual determination by the District Court as to whether or not the Government actually entered Petitioner's house prior to the search warrant, and if so whether or not the evidence obtained pursuant to the search warrant should be suppressed.

As outlined in the statement of facts, at the evidentiary hearing on January 5 and 6, 1981, on Petitioner's motion to suppress. Petitioner introduced the testimony of the McCullough brothers. The purpose and thrust of this testimony, primarily of Patrick McCullough, was to show that the Government had, in fact, entered the Petitioner's residence some time after the Petitioner was arrested on the evening of October 7, 1980, and before the execution of the search warrant on the afternoon of October 8, 1980. The trial court basically took a "so what" attitude concerning the factual issue, ruled that it was irrelevant whether or not the Government had in fact entered the residence prior to the search warrant, and denied Petitioner's motion to suppress.

Petitioner submits that the testimony of the McCullough brothers, especially that of Patrick McCullough, even speaking to us as it does from the cold and colorless transcript, is of unusual credibility. It is extremely rare to be able to make this comment concerning testimony as reflected only in a transcript, but this is one of those extremely rare cases. Petitioner recognizes that the McCullough testimony was disputed by the testimony of the DEA agents.

The Government had absolutely no right to enter and search the house of Petitioner without the benefit of a search warrant.

"Thus the most basic constitutional rule in this area is that" searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated excep-

tions. The exceptions are "jealously and carefully drawn", and there must be "a showing by those who seek exemption that the exigencies of the situation made that course imperative". *Collidge* v *New Hampshire*, 81 S Ct 2022, 2032 (1971). CF. *United States* v *Sokolow*, 450 F 2d 324, 325 (5 Cir 1971).

There is no higher expectation of privacy than in one's own home. The actions of the DEA in searching Petitioner's home prior to the obtaining of a search warrant on the next day fatally tainted any evidence uncovered pursuant to said illegality.

> "While this warrant requirement has a technical ring, the necessity for a warrant, absent exigent circumstances, has been part of our constitutional jurisprudence since at least 1791, and the exclusionary rule part of its enforcement since Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 1914." *United States* v *Rivera*, 486 F Supp 1025, 1037 (1980).

> "It would not be possible to add to the emphasis with which the framers of our constitution and this Court * * * * have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the constitution by these two amendments [the Fourth and the Fifth] * * * *

> "It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encrouchment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of Courts or by well-intentioned, but mistakenly overzealous executive officers." *Gouled* v *United States*, 225 US 298, 303-304, 41 S Ct 261, 263, 65 (1921).

In *Wong Sun* v *United States*, 371 US 471, at 488 (1963), the Supreme Court added to its prior decisions dealing with the fruit of the poisonous tree doctrine, which

calls for the exclusion of evidence obtained as an indirect result of illegal activities. The Supreme Court formulated a test to be applied to decide whether such evidence should be excluded from use at trial. The test is, in pertinent part, whether granting establishment of the primary illegality, the evidence to which objection is made had resulted from exploitation of that illegality, or whether it has come about by means sufficiently purged of the primary taint of illegality.

It is generally recognized that the Government bears the burden of demonstrating that prior illegal acts have not tainted the evidence or statements that the prosecution seeks to introduce. See *Harrison* v *United States*, 392 US 219, at 224-226 (1968), where defendant sought to suppress statements made after the Government illegally obtained and introduced prior confessions; and *Brown* v *Illinois*, 422 US 590, at 597-604 (1975), where the Government sought to introduce statements made by the accused after he was subjected to an illegal arrest.

In *United States* v *Paroutian*, 299 F 2d 486 (2nd Cir 1962), the United States Commissioner of Narcotics, Department of Treasury, received information from Interpol about a French citizen suspected of drug activity. Interpol said that the suspect owned an apartment in New York, and provided the Treasury Department with the address. United States' agents searched the apartment illegally, without benefit of a search warrant, and observed a new cedar lining in one of the closets. A further unauthorized entry disclosed that defendant also lived in the apartment, and photographs of defendant were taken from the apartment during that second entry. The Government later made a legal entry into the apartment, and seized drugs and a letter written by defendant which were hidden behind the closet lining. Defendant attempted to suppress the evidence so seized as a fruit of the prior illegal entries. The court addressed the question of whether the evidence seized in the legal search

was tainted by the first two illegal searches. The court applied the fruit of the poisonous tree doctrine as follows:

> "An unlawful search taints all evidence obtained at the search or through leads uncovered by the search. This rule, however, extends only to facts which were actually discovered by a process initiated by the unlawful act. If information which could have emerged from an unlawful search in fact stems from an independent source, the evidence is admissible. [Citations Omitted] On the other hand, a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities." P 489.

This independent source exception is one of three recognized ways that the Government can meet its burden to show that evidence seized or discovered following an illegal act is not tainted by that act. See *Silverthorne Lumber Co* v *United States*, 251 US 385 (1920).

A second method by which the Government may purge the taint that illegal acts put on evidence derivatively discovered by showing that the connection between the illegal conduct and the discovery of the evidence has "become so attenuated as to dissipate the taint." *Nardone* v *United States*, 308 US 338, 341 (1934). This exception is applicable only when there is "an independent act sufficient to break the causal connection between the alleged primary illegality and the evidence found as a result of the second search and admitted at trial." *United States* v *Fike*, 449 F 2d 191, 193 (5th Cir 1971). In the present case, however, the discovery

of the drugs in Petitioner's residence occurred within only a few hours of the illegal entry. It may well be that here the affidavit supporting the issuance of the search warrant does not recite facts obtained from the illegal entry to Petitioner's residence, but the time proximity is so close that certainly the burden of proof was on the Government, assuming an illegal entry, to demonstrate to the District Court that the evidence so obtained was not the result of such illegal entry.

The third method of purging the taint of an illegal entry is by application of the "inevitable discovery" limitation on the exclusionary rule. This limitation would allow the admission of the drugs if the Government could show that agents searching Petitioner's home under the warrant would have found the drugs eventually, even without benefit of the prior illegal act. The testimony here, however, showed that, as testified to by Patrick McCullough, the agents were offering to allow Patrick McCullough to become "high" by using the remains of the "white stuff" at Defendant's house. Further, the Fifth Circuit has completely rejected this limitation. The rationale behind this rejection is expressed in *United States* v *Castellana*, above, 488 F 2d 65, at 68 (5th Cir 1974), where the court stated,

> "To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exculsionary rule as a deterrent to improper police conduct."

See also *United States* v *Houltin*, 525 F 2d 943, 949 (5th Cir 1976); *Parker* v *Estelle*, 498 F 2d 625, 629 - 630 (5th Cir 1974), cert den'd 421 US 963 (1975). See also the rationale set forth in *United States* v *Paroutian*, above, 299 F 2d 486, at 489 (2nd Cir 1962).

Petitioner recognizes that there is no clear testimony that the Government obtained drugs from Defendant's house as a derivative result of its prior illegal entry. Nevertheless, the burden was on the Government, under

the circumstances where there was a prior entry without a warrant, to purge the suggestion of the taint on the evidence subsequently seized pursuant to a search warrant.

Petitioner wishes to emphasize the nature and importance of his constitutional right not to have his home searched without a warrant. See the discussion and citations at the outset of this argument. Further, the Supreme Court has stated that physical entry of a house is the chief evil against which the wording of the Fourth Amendment is directed. *United States* v *United States District Court*, 407 US 297, at 313 (1972). Counsel for Petitioner have not been able to find any Fourth Amendment cases which set forth the standard the Government must meet or overcome in order to bear its burden of purging the taint from evidence seized following illegal activity which may have led to the evidence. The Supreme Court has recognized, however, in Sixth Amendment cases that this burden must be overcome by clear and convincing evidence.

In *United States* v *Wade*, 388 US 218 (1967), the Supreme Court held that a post-indictment pre-trial lineup for identification purposes is a critical stage of prosecution at which the defendant, by virtue of the Sixth Amendment, is entitled to have his attorney present. If the Sixth Amendment right is denied and an out-of-court identification of defendant is made at such a lineup by a witness, then the Government may only introduce in-court identification testimony by that witness if it establishes that the in-court identification was based upon observations of the defendant made elsewhere other than the lineup identification. The denial of right to counsel at such a lineup was held by the court to taint subsequent in-court identifications made by the witness attending the lineup under the *Wong Sun* fruit of the poisonous tree test. Such taint can only be removed by a showing of clear and convincing evidence that the in-court identification is supported by independent information. See *Wade* at 240.

This clear and convincing evidence standard should be applicable as well to Fourth Amendment exclusions. The policy behind excluding evidence derived from violations of the Sixth Amendment is to deter Government agents from committing future violations. See *Wade*, above, and *Stovall* v *Denno*, 388 US 293, at 297 (1967).

Exclusion of evidence for Fourth Amendment violations is based on the same policy:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." *Elkins* v *United States*, 364 US 206, 217 (1960).

See also, *Stone* v *Powell*, 428 US 465, at 484 - 488 (1966). In *Elkins* evidence was seized by state officials for state prosecution in what was determined to be an illegal search under state law. This evidence was then turned over to federal agents for prosecution under a federal statute. The evidence was ultimately suppressed to protect Fourth Amendment guaranties by deterring such illegal action in the future. This same policy should be applied to the exclusion of evidence obtained in violation of Fifth Amendment rights and guaranties. See *Brown* v *Illinois*, 422 US 590, at 597 - 604 (1975).

Inasmuch as the purpose and policy behind excluding evidence for violations of the Fourth, Fifth, and Sixth Amendments to the United States Constitution are intrinsically the same, there is no reason why the *Brown* clear and convincing evidence standard should not have to be met by the Government to purge the taint on evidence discovered or seized following illegal searches and other Fourth Amendment violations. Further, it should be emphasized that the *Brown* court held that the purpose and flagrancy of police misconduct are relative to decision of whether to exclude evidence tainted by prior illegalities. 422 US at 604. The misconduct of the Government suggested by the facts of the instant case was certainly flagrant and intentional, and should not be condoned or ignored.

Accordingly, in view of the testimony of the McCulloughs, and inasmuch as the Government has failed to meet its burden of proof by clear and convincing evidence that the evidence it obtained by the search was not tainted, this Court should reverse the lower courts and dismiss the case against Petitioner. In the alternative, at a minimum, this Court should remand the case to the District Court for a hearing and an express determination concerning whether or not the Government actually entered the Petitioner's house prior to the search warrant, and if so, whether or not the evidence obtained by the Government pursuant to the search warrant was and remained tainted.

CONCLUSION

For the following reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully Submitted,
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May 12, 1983.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-5435
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOWARD MESSNER,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

(December 10, 1982)

Before HILL, KRAVITCH and HENDERSON, *Circuit Judges.*

PER CURIAM:

Defendant, Howard Messner was indicted for possession of 508.4 grams of cocaine, with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1967). Defendant filed a motion to suppress the evidence, acknowledging that although there was a valid search warrant, there had been a prior illegal search. The motion to suppress was denied and we affirm for the reasons stated below.

Initially, we must address the issue raised by appellant that the district court erred by not allowing defendant's

counsel during closing argument to comment on the penalties involved for conviction of the crime charged. We find this issue totally without merit and we affirm the district court's decision.

Appellant also raises the issue of a prior illegal search. Appellant contends this prior search tainted the valid search and therefore, any evidence uncovered by the valid search should be suppressed under *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Appellant, however, does not suggest that the valid search warrant was obtained in reliance on, or by use of any information gathered by the prior transgression. Because the information in the affidavit used to obtain the search warrant was independently gathered and did not come from anything having to do with the prior transgression, we affirm the district court's denial to suppress the evidence. *See United States* v *Lewis*, 621 F.2d 1382, 1389 (5th Cir. 1980); *see also Wong Sun* v. *United States*, 371 U.S. 471 (1963); *United States* v. *DeSimone*, 660 F.2d 532 (5th Cir. 1981).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-5435

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HOWARD MESSNER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
(February 22, 1983)

Before HILL, KRAVITCH and HENDERSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
(s) JAMES C. HILL
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
EVIDENTIARY HEARING
JANUARY 6, 1981
RULING

THE COURT: I find that there was probable cause for the issuance of the search warrant for the residence, on the basis of the affidavit of the DEA agent, Joseph Doredant. I also find that from the facts recited in that affidavit, in testimony presented at the hearing yesterday, that there existed sufficient probable cause to stop the subject vehicle and arrest the occupants, Uejbe and Munoz, in one vehicle and Messner in the other. And there also is sufficient cause for the issuance of the warrant to examine the contents of the tool box.

Besides the facts and information recited in the affidavit, there was corroboration of nonmenial details to demonstrate the accuracy of the informant's recitation of the criminal activity.

Whether there was entry in the Messner house by the DEA agents, prior to the issuance of the search warrant, is immaterial to the issue before me today. The warrant does not appear to be based on any information allegedly obtained by the prior entry, if any.

In addition, I find the limited search of the station wagon prior to the warrant, was proper.

According, the motions to suppress are denied. A written order will be entered supplementing this oral ruling. And we are ready to go to trial. I have severed the defendant, Messner, from the other two. We will go to trial tomorrow on the defendant, Munoz, at 9:30.